Supreme Court, U.S.
FILED

(1)

No. 03 303 AUG 20 2003

In The
Supreme Court of the United States

CLARENCE ARIC THOMPSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*SUZANNA KOSTOVSKI
ATTORNEY AT LAW
1420 Washington Blvd., Suite 200
Detroit, Michigan 48226

313-965-6050

Attorney for Petitioner
**Counsel of Record*

August, 2003

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

81PP

QUESTIONS PRESENTED

I.

Whether the evidence was sufficient to support the verdict for heroin possession with intent to distribute or to distribute?

II.

Whether Petitioner's constitutional rights of due process and trial by jury were violated where the district court sentenced Petitioner to a quantity of controlled substances greater than what the jury determined beyond a reasonable doubt?

III.

Whether the district court committed reversible error by denying Petitioner a minor role adjustment for the offense?

IV.

Whether Petitioner's conviction for violating 18 U.S.C. § 922(g)(1) should be reversed since Petitioner did not have a prior felony within the definition of the statute?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are: (1) United States who was the Plaintiff in the district court criminal action and Appellee in the Court of Appeals, and (2) Clarence Thompson who was the Defendant in the district court criminal action and Appellant in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF APPENDIX CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 15

EVIDENCE WAS INSUFFICIENT FOR THE POSSESSION OF HEROIN WITH INTENT TO DISTRIBUTE CONVICTION 16

PETITIONER'S SENTENCE VIOLATED *APPRENDI* 20

PETITIONER QUALIFIED FOR A MINOR ROLE ADJUSTMENT 24

THE CONVICTION FOR FELON IN POSSESSION MUST BE VACATED 25

CONCLUSION 26

TABLE OF APPENDIX CONTENTS

6TH CIRCUIT FILINGS **PAGE**

Opinion Affirming Judgment
of District Court,
5/22/03 ..... A1 - A16

Letter to Sixth Circuit
re: 18 U.S.C. § 922(g)(1)
1/17/03 ..... B1 - B11

Attached

Opinion,
10/3/02 ..... B3 - B11

EASTERN DISTRICT OF MICHIGAN FILINGS

Judgment of Sentence
9/20/01 ..... C1 - C13

Verdict Form
5/30/01 ..... D1 - D5

FEDERAL STATUTE

18 U.S.C. § 922(g)(1) ..... E1 - E1

TABLE OF AUTHORITIES

Cases **Pages**

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d (2000) 21, 22

Harris v. United States, _____U.S._____, 122 S.Ct. 2406, ____L.Ed.2d_____ (2002) 21, 22

United States v. Bell, 954 F.2d 232 (4th Cir. 1992) 16, 18

United States v. Bostic, 480 F.2d 965 (6th Cir. 1973) 20

United States v. Burns, 298 F.3d 523 (6th Cir. 2002) 23

United States v. Galvan, 693 F.2d 417 (5th Cir. 1982) 17

United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) 19, 20

United States v. Gordon, 712 F.2d 110 (5th Cir. 1983) 16, 17

United States v. Guinta, 925 F.2d 758 (4th Cir. 1991) 18

United States v. Hunte, 196 F.3d 687
(7th Cir. 1999) 25

United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993) ... 23

United States v. Pearce, 912 F.2d 159
(6th Cir. 1990) 16, 18, 19

United States v. Robertson, 110 F.3d 1113
(5th Cir. 1997) 17

United States v. Ross, 58 F.3d 154 (5th Cir. 1995) 17

United States v. Stanley, 765 F.2d 1224
(5th Cir. 1985), *cert. denied*, 498 U.S. 1093,
111 S.Ct. 978, 112 L.Ed.2d 1063 (1991) 16

United States v. Wegrzyn, 305 F.3d 593
(6th Cir. 2002) 25

United States v. Wexler, 838 F.2d 88 (3rd Cir. 1988) ... 18

Statutes

18 U.S.C. § 922(g)(1) ..... i, iv, 3, 15, 25

21 U.S.C. § 841(B)(1)(A) 21

21 U.S.C. § 846 ..... 4, 16

21 U.S.C. §§ 841(a)(1) 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

Court Rules

Supreme Court Rule 13.3 2

Other

U.S.S.G. § 1B1.3 23

U.S.S.G. § 3B1.2 24

Nº____

In The
Supreme Court of the United States
October Term 2003

CLARENCE THOMPSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Clarence Thompson respectfully prays that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding affirming Petitioner's conviction and sentence following a jury trial in the United States District Court for the Eastern District of Michigan, Northern Division. Certiorari is requested so that this Court may afford relief to Petitioner, who was convicted for an offense for which there was insufficient evidence establishing guilt beyond a reasonable doubt, who was sentenced for higher drug quantities than found by the jury by way of special verdict

form, who was wrongfully denied a minor role adjustment and who was convicted of an offense for which he did not meet the legal definition of a prior felony.

OPINIONS BELOW

The Opinion from the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction and sentence is reprinted at A1 - A16. The Judgment of Sentence of the District Court is reprinted at C1 - C13.

JURISDICTION

The Opinion of the Sixth Circuit affirming Petitioner's conviction and sentence was entered on or about May 22, 2003. The mandate was issued on or about June 13, 2003. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.3, Supreme Court Rules, this Petition for Certiorari has been filed within 90 days of the date of the Opinion of the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1), provides in pertinent part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

This is an appeal from the jury conviction of March 30, 2001 and the Judgment of Sentence of September 20, 2001, imposed by the Honorable David M. Lawson, United States District Court Judge for the Eastern District of Michigan.

On February 25, 1999, a nineteen count Indictment was filed in the district court in Bay City, Michigan, charging the Petitioner, Clarence Aric Thompson (hereafter

"Petitioner" or "Thompson"), along with fourteen other defendants with Count 1, conspiracy to distribute and possess with intent to distribute various quantities of cocaine base (crack cocaine), cocaine, heroin and marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. In Count 8, Thompson was charged with distribution of a quantity of cocaine base (crack cocaine), which allegedly occurred on or about October 15, 1998 in violation of sections 841(a)(1) and 846. Count 17 charged Thompson with possession with the intent to distribute cocaine base (crack cocaine), allegedly occurring on or about December 3, 1998 and Count 18 charged Thompson with possession with intent to distribute marijuana, also allegedly occurring on or about December 3, 1998. According to the indictment, the charged conspiracy commenced at some point unknown to the grand jury and continued until approximately December, 1998.

Subsequently, on July 14, 1999, a thirty-five count First Superseding Indictment was filed naming the fifteen original defendants and seven additional defendants were added. Thompson was arraigned on August 11, 1999 and not guilty pleas were entered. On September 27, 2000, a forty-three count Second Superseding Indictment was filed as to the

Petitioner and eight of the previously named defendants, adding eight additional counts. No new charges were filed against the Petitioner.

A criminal jury trial commenced on March 1, 2001. On March 30, 2001, the Petitioner was found guilty of Count 1: conspiracy to commit the crime of possession with intent to distribute various quantities of cocaine totaling 500 grams but less than 5 kilograms; various quantities of heroin totaling less than 100 grams; various quantities of cocaine base (crack cocaine) less than 5 grams and various quantities of marijuana totaling less than 50 kilograms; guilty of Count 8, distributing cocaine base(crack cocaine) on or about October 15, 1998; guilty of Count 17, possession of cocaine base(crack cocaine) with intent to distribute on or about December 3, 1998; guilty of Count 18, possession of marijuana with intent to distribute on or about December 3, 1998; guilty of Count 26, possession of a firearm in furtherance of a drug trafficking offense on or about December 3, 1998 and guilty of Count 27, felon in possession of a firearm.

On July 27, 2001, a Presentence Investigation Report ("PSI") was prepared. The probation department calculated Petitioner's base offense level at 34, primarily on the

testimony of Derrick Peterson, a co-defendant and cooperating witness against Petitioner, who had committed perjury in front of the grand jury on two occasions and who Defendant had only known for less than 6 months. In addition, the jury verdict had found Petitioner responsible of far less quantities than was calculated by the probation department and ultimately determined by the district court. Following disposition of Petitioner's objections at sentencing, on September 20, 2001, Thompson was sentenced to a term of 195 months. This custody term consists of 135 months on Counts 1, 8, and 17, concurrent; 60 months on Count 18, concurrent; and 120 months on Count 27, concurrent. Count 26 was for a term of 60 months, and was to run consecutive to all other counts.

During the trial, there were only two witnesses that testified against Petitioner, Oralia Donald and Derrick Peterson. Donald testified that she was 22 years old and was currently in prison for assault with intent to commit great bodily harm less than murder and carrying a concealed weapon. She had known Thompson for about 10 years. She stated that she and Thompson became involved in drugs a few years after they had met. The most she purchased from

Thompson prior to 1998 was one-quarter ounce of crack cocaine.

Donald was incarcerated in 1995 and was released to a halfway house in April 1998. She made contact with Thompson and he apparently "fronted" her a quarter ounce of crack, which she resold herself. In September 1998, she apparently got into trouble at the halfway house and she then agreed to cooperate with the government and set up a controlled buy from Thompson. The controlled purchase took place on October 15, 1998.[1] Donald was accompanied by an undercover officer. They arrived at Thompson's home and went inside. The agent asked for drugs and Thompson was initially not willing to make the sale. He told the agent to go

---

[1] This particular transaction was the subject of Count 8 of the Second Superseding Indictment. It should also be noted that with respect to this particular Count, the jury apparently discredited Ms. Donald's testimony since they found Petitioner guilty of only possessing with intent to distribute and to distribute less than 5 grams of cocaine base (crack cocaine). The jury's verdict as to this finding was probably based on the allegations in Count 17, when officers seized a total of 3 grams of crack cocaine from the search of Thompson's residence on December 3, 1998.

and purchase some cigarettes. Donald stayed behind. When the officer returned, Donald and Thompson were on the front porch engaged in conversation. Donald went and obtained the money from the agent and Thompson then retrieved some drugs from behind the smoke detector and they left.

There was evidence presented at trial that between 1993 and 1994, Derrick Peterson purchased cocaine from the Detroit area to sell in his hometown of Saginaw. Beginning in 1993 and continuing until 1997, one of Peterson's customers was Ruby Liddell, who would allegedly travel to Detroit to pick up one-eighth kilograms (4.5 ounces) of cocaine from Peterson.[2]

Peterson testified that he met Thompson through Marcus

---

[2] Peterson was arrested in July, 1992 and pled guilty to charges of possession with intent to deliver less than 50 grams of cocaine and carrying a concealed weapon. He was subsequently sent to prison, and was released on parole in March, 1993. He was arrested again in July, 1993 when cocaine was found in his vehicle, but these charges were dismissed. He was arrested on December 3, 1998 and charged in the instant case. He entered into a cooperation agreement with the government where his sentence would be reduced by 60% from 251 months.

Jones in late 1997 or early 1998. Thompson apparently wanted to purchase 9 ounces of cocaine and he made the sale to him. A fter this first sale, he allegedly sold Thompson cocaine on a regular basis until December 3, 1998. Peterson estimated that he sold to Thompson and purchased from Thompson approximately 15 kilos of cocaine during 1998. He also admitted that some of this cocaine belonged to Ruby Liddell, but he could not provide an estimate of how much.

The jury did not believe Peterson's testimony regarding the 15 kilos of cocaine powder since they only found Thompson guilty of conspiring to possess with the intent to distribute or to distribute various quantities of cocaine totaling **500 grams but less than 5 kilograms**.

The jury did not believe Peterson because on two occasions, he admitted to committing perjury before the grand jury. A separate record was made regarding Peterson's perjured testimony before the grand jury. Peterson stated on April 14, 1999 and July 21, 1999, he testified before the grand jury. He admitted that on both occasions he was asked whether he wanted to make any changes to his testimony before the grand jury when he had finished testifying and he indicated that he had no changes to his testimony.

On March 7, 2001,[3] agents approached him and requested another interview. It was during that interview that the government discovered that he had twice committed perjury before the grand jury.[4] He admitted that his testimony before the grand jury on both occasions was different than what he told the agents on March 7, 2001.[5]

Petitioner's statement that he gave to the police was also offered into evidence. The statement was sanitized to exclude the names of the various non-testifying co-defendants.

---

[3] By this date, the trial was already in progress.

[4] Indeed, Peterson underwent a polygraph examination and the polygraph results clearly showed that he had lied to the grand jury.

[5] On March 19, 2001, counsel for co-defendant Marcus Jones filed a Motion to Dismiss Second Superseding Indictment on the basis of Peterson's perjured testimony. All counsel for all defendants joined in the Motion. Oral arguments were heard on the Motion on March 19, 2001. The district court denied the Motion on the basis that all counsel had ample opportunity to cross-examine Peterson on his prior admittedly perjured testimony before the grand jury.

The sanitized statement was read to the jury by Detective Michael Winters:

> Mr. Thompson stated that he had been involved with Derrick Peterson and other individuals for approximately one year.
>
> Thompson stated that he was not a big dealer and only sold marijuana and some crank. He stated that he had met Peterson, also known as Dino, approximately six months prior through a friend of Thompson's who had brought Peterson to Thompson's house.
>
> Thompson stated that there had been a drought of cocaine during the summer of 1998, and that he was present when Peterson purchased two kilos of cocaine for $22,000 each.
>
> Thompson further stated that Peterson had told him that Peterson was dealing with Brent Crittendon in cocaine, and that Peterson also dealt with Michael Pratt on occasions.
>
> Thompson stated that he and others went to

Detroit and bought some clothes, later they met with Peterson and went out with some girls and went to a couple show bars, topless bars, and did some partying.

Thompson stated that he dealt in marijuana and cocaine, but mostly marijuana. Thompson provided the cell phone number for Peterson of (313) 402-8427.

Thompson stated that he and others, people he was involved with, had traveled in two cars to a location 40 minutes past Grand Rapids and met some Mexicans. That one of the other people knew – the others knew, Thompson did not know the names of the Mexicans, but there were at least two of them.

These individuals were known to some of the other people Thompson was with, and one of those two people had a telephone and a paper number for the Mexicans.

The Mexicans had fronted two kilos of cocaine to one of the individuals that Thomas was with, and one of the other people drove

back to Saginaw separately with the cocaine in his car.

Thompson stated he knew three locations where another person stored marijuana, heroin and cocaine, and that Thompson had been to those locations with that person to pick up heroin and marijuana.

One of these locations was at 3848 Highland, and Thompson stated that he had been there within the last two weeks with that other person to pick up heroin.

Thompson stated that he had also been with this same person when that person took heroin to the residence of LeRoy Austin who also dealt with this other person.

Thompson stated that within the last two weeks he had also been with this same person to a residence at 3228 Roberts in Saginaw when this other person dropped off what Thompson believed to be a half ounce of heroin for a woman who was holding it for this other person at that location.

Thompson stated that some of the other people he was dealing with also sold heroin.

Thompson stated that one of the individuals that Thompson was dealing with kept assets he acquired in the name of other people.

Thompson said all of the individuals Thompson was dealing with sold a lot of drugs.

Thompson stated that Brent Crittendon supplied most of the people on the south side of Saginaw with cocaine.

Thompson was aware that Peterson stored drugs at the home of a girlfriend of Peterson's named Valerie and that Thompson and Peterson had been to that location when Peterson picked up two eighths kilos of cocaine which were in paper bags.

Thompson said that Peterson was in Saginaw two or three times a week.

A special verdict form was presented to the jury. The Verdict Form required the jury to make specific findings of fact as to the conspiracy count by specifying the type and

amount of drugs attributable to the Petitioner. The Verdict Form is reprinted at D1 - D5. In examining the verdict, it is obvious that the jury did not believe that Petitioner was a large scale dealer as alleged by the government.

REASONS FOR GRANTING THE PETITION

Petitioner is seeking to set aside his conviction for possession of heroin with intent to distribute or to distribute since the evidence did not establish guilt beyond a reasonable doubt. Petitioner is also seeking to vacate his sentence since his Fifth and Sixth Amendment rights were violated when the trial court sentenced him for a quantity of controlled substances that it determined independently by a preponderance of the evidence standard, which was greater than that specifically found by the jury beyond a reasonable doubt by the special verdict form. The district court should have applied a higher standard of proof in sentencing Petitioner to a sentence that was more than twice as long as that authorized by the jury's special verdict as to Count I. The district court should also have granted Petitioner a minor role adjustment based on the evidence that was presented. Finally, the Sixth Circuit should have vacated Petitioner's conviction for felon in possession pursuant to 18 U.S.C. § 922(g)(1)

since Petitioner's prior "felony" was a misdemeanor crime of domestic violence, to which he was sentenced to probation and which he completed before the indictment in this case. Thus, at the time Petitioner was charged as a felon in possession, he did not have a prior felony.

EVIDENCE WAS INSUFFICIENT FOR THE POSSESSION OF HEROIN WITH INTENT TO DISTRIBUTE CONVICTION

To convict a defendant under § 846, "the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join and participated in the conspiracy." *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990) (quoting *United States v. Stanley*, 765 F.2d 1224, 1237 (5th Cir. 1985), *cert. denied*, 498 U.S. 1093, 111 S.Ct. 978, 112 L.Ed.2d 1063 (1991). This requires that "the defendant had the **deliberate, knowing, and specific intent to join the conspiracy** . . . ." *United States v. Gordon*, 712 F.2d 110, 114 (5th Cir. 1983) (emphasis added). Circumstantial evidence may be used to establish a defendant's intent, but "[s]uch inferential analysis is not boundless. . . ." *United States v. Bell*, 954 F.2d 232, 236 (4th Cir. 1992).

The evidence at best indicated that Petitioner was present when a co-defendant went to deliver some heroin on two different occasions. This was established by Petitioner's sanitized statement that was read to the jury by Detective Winters. No other evidence was presented linking Petitioner to heroin activities. "When the government attempts to prove the existence of a conspiracy by circumstantial evidence, each link of the inferential chain must be clearly proven." *United States v. Robertson* , 110 F.3d 1113, 1119 (5 th Cir. 1997) (quoting *United States v. Ross*, 58 F.3d 154, 160 (5th Cir. 1995). The government may not prove knowledge and participation in a conspiracy merely by presenting evidence placing the defendant in a "climate of activity that reeks of something foul." *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir. 1982).

This case comes dangerously close to expanding conspiracy into a crime of association with the wrong people. "A conspiracy is not shown until the government has presented evidence of a *specific* agreement to commit a *specific* crime, for the same criminal purpose, on the part of all indicted conspirators." *United States v. Gordon, supra*, at 114 (emphasis original).

This case is analogous to *United States v. Pearce*, *supra*, where the Court reversed the defendant's conspiracy conviction on the basis that even the presence of the defendant and co-defendant in a house containing crack cocaine was insufficient evidence to show an agreement between the parties as to conspiracy to distribute crack cocaine. The government's only evidence was Petitioner's sanitized statement. From this, the jury merely inferred that Petitioner somehow joined the charged conspiracy to possess with intent to distribute or to distribute heroin under 100 grams. As the Fourth Circuit noted in *United States v. Bell*, *supra* at 236, while circumstantial evidence may be used to establish a defendant's intent, "[s]uch inferential analysis is not boundless. . . ." The federal courts have held that, though elements of a conspiracy may be proven by circumstantial evidence, "each element of the offense must be proven beyond a reasonable doubt." *United States v. Wexler*, 838 F.2d 88, 90 (3rd Cir. 1988). One element that the government must prove beyond a reasonable doubt is that some specific conspiracy existed. As the Fourth Circuit noted in *United States v. Guinta*, 925 F.2d 758, 764 (4th Cir. 1991):

> [C]ircumstantial evidence that proves nothing more than association between two persons, even if one has a fixed intent known to the other to commit an unlawful act, is not sufficient to permit the inference of the requisite agreement between the two to act in concert to commit the act. Because conspiracy requires agreement between at least two persons to take a concerted action if the purposes of the alleged coconspirators are different, though both are aimed at unlawful goals, there is no conspiracy.

This case is most analogous to *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999), where the Court found that only one of the six defendants alleged were part of the Shore North Point (SNP) organization. The other six defendants were shown to have independently sold a lot of drugs. Some bought from each other. Others, though acting independently, associated with each other. The government's evidence merely established that Petitioner was present when heroin was delivered on two occasions with one the alleged co-defendants. As the Court noted in *United States v. Pearce*,

supra, "mere association with conspirators is not enough to establish participation in a conspiracy." In *United States v. Gibbs, supra* at 422, the Court, quoting from *United States v. Bostic*, 480 F.2d 965, 968 (6 th Cir. 1973) stated that "[t]he distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders." This Court should grant the writ and/or order a new trial.

PETITIONER'S SENTENCE VIOLATED *APPRENDI*

In this case, the jury made a specific determination that the Petitioner was guilty of the crime of conspiracy to possess with intent to distribute or to distribute various quantities of cocaine totaling 500 grams but less than 5 kilograms.[6]

The district court's finding that Petitioner was responsible for 5-15 kilograms of cocaine and 50 grams of

---

[6] Section 841(b)(1)(B) imposes a mandatory 5-year prison sentence for an individual convicted of violating § 841(a) and the quantity at issue is 500 grams but less than 5 kilograms.

cocaine base (crack), automatically placed Petitioner at the mandatory 10-year minimum sentence under 21 U.S.C. § 841(B)(1)(A), or level 34 under the guidelines. Had the district court adopted the jury finding as to drug types and quantities, Petitioner's base offense level would have been 26. The difference between both levels is a doubling of Petitioner's sentence.

In *Harris v. United States*, _____U.S._____, 122 S.Ct. 2406, 2418, ____L.Ed.2d_____ (2002), the Supreme Court held that a fact that increases the lower limit of the sentencing range, but not the upper limit, need not be found by the jury under *Apprendi*[7] because the Fifth and Sixth Amendments ensure that the defendant "will never get more punishment than he bargained for when he did the crime, but they do not promise that he will receive anything less than that") (internal quotation marks and citation omitted). In this case, the upper limit of the sentencing range was increased due to the district court's attribution of additional drug quantities that were not found by the jury.

---

[7] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d (2000).

The upper range was 87 months based on the jury verdict.[8] The court's calculation placed Petitioner's range at 168-210 months. Petitioner's sentence of 135 months (which takes into account the two points for acceptance of responsibility) is 48 more months greater than the upper limit of level 26.[9] Under even the government's scenario, both *Apprendi* and *Harris* were violated.

Furthermore, the district court's finding of the additional drug amounts was attributed to Thompson as relevant conduct. This finding was the functional equivalent of an element of a greater offense, which clearly negated the specific findings of the jury, and exposed the Petitioner to punishment greater than that prescribed by the jury's verdict. This attribution of additional quantities effectively nullified the jury verdict and violated the Petitioner's Fifth and Sixth

---

[8] Level 26 with a criminal history category II placed Petitioner in a guideline range of 70-87 months. Subtraction of 2 points for acceptance of responsibility placed Petitioner at level 24, CHC II, or a guideline range of 57-71 months.

[9] The additional 48 months is calculated by subtracting 87 months (the high end of level 26) from 210 months (the high end of level 34).

Amendment rights since he received more punishment than he bargained for when he allegedly committed the crime.

Moreover, the finding also violated U.S.S.G. § 1B1.3 of the guidelines. As this Court has noted, "a coconspirator is not necessarily responsible for the total amount of cocaine involved in the conspiracy for the purposes of establishing his base offense level. Rather, a participant is responsible for other conspirators' conduct only if that conduct was reasonably foreseeable to him and in furtherance of the execution of the jointly undertaken criminal activity." *United States v. Jenkins*, 4 F.3d 1338, 1346 (6th Cir. 1993), quoted in *United States v. Burns*, 298 F.3d 523, 545 (6th Cir. 2002). Here, the evidence (as found by the jury), clearly showed that Petitioner was a small time player. While its true that Derrick Peterson testified that he either purchased or sold 15 kilos of cocaine to or from Thompson during 1998, Peterson also admitted that some of this same cocaine belonged to Ruby Liddell, but he could not provide an actual estimate of how much belonged to whom. Peterson was also an admitted perjurer and the jury obviously did not believe Peterson's testimony regarding the alleged 15 kilos of powder since the jury only found Thompson guilty of conspiring to possess with the intent to distribute or to distribute various quantities

of cocaine totaling 500 grams but less than 5 kilograms.

Under either scenario, Petitioner's Fifth and Sixth Amendment rights were violated when the district court went outside the jury's verdict and attributed additional drug quantities that were expressly rejected by the jury. It makes no sense to request a special verdict regarding the drug quantities and then ignore that verdict at sentencing.

PETITIONER QUALIFIED FOR A MINOR ROLE ADJUSTMENT

Pursuant to U.S.S.G. § 3B1.2, a two-level increase is warranted if a defendant is shown to be a minor participant in the criminal activity. According to the Guidelines, a minor participant "means any participant who is less culpable than most other participants, but whose role could not be described as minimal. U.S.S.G. § 3B1.2, Application Note 3. In this case, Petitioner played a very minor role in this offense as reflected by the jury's verdict vis-a-vis the other co-defendants. All of the evidence indicated that he was a low level dealer and that his involvement was certainly less culpable than the other members of the charged conspiracy. This argument is supported by the jury verdict in its determination of drug quantities for this Petitioner.

See United States v. Hunte, 196 F.3d 687 (7th Cir. 1999) (holding that a defendant is entitled to an adjustment for role in the offense based on a finding that the defendant was a minor participant in that she was less culpable than most other participants).

THE CONVICTION FOR FELON IN POSSESSION MUST BE VACATED

Petitioner was convicted of 18 U.S.C. § 922(g)(1) as being a felon in possession. Thompson's prior "felony" was a misdemeanor crime of domestic violence, to which he was sentenced to probation and which he completed before the indictment in this case. According to *United States v. Wegrzyn*, 305 F.3d 593 (6th Cir. 2002), a misdemeanant convicted of domestic violence in Michigan who was not sentenced to periods of incarceration should be able to possess firearms upon completion of the sentence of probation, since such misdemeanant sentenced to jail is able to possess firearms after they are released, when their civil right to vote is restored. Otherwise, one convicted of a more egregious offense would be allowed to possess a firearm while one who committed a less serious offense would not. The Court further noted that the interpretation of the federal

statute is mandated by applicable law and gives effect to the intent of the Michigan Legislature. In this case, Petitioner's conviction for felon in possession must be vacated since he should not have been convicted of an offense for which the government did not establish one of the key elements, a prior felony, beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition and issue a writ of certiorari remanding to the District Court for an Order vacating Petitioner's heroin and felon in possession convictions and/or resentencing.

SUZANNA KOSTOVSKI
(Counsel of Record)
Suite 200
1420 Washington Boulevard
Detroit, MI 48226
313-965-6050

Date: August 20, 2003

Table of Appendix Contents

U.S. COURT OF APPEALS - 6TH CIRCUIT:

Opinion,
filed 5/22/03 ..... A1- A16

Letter to Sixth Circuit,
1/17/03 ..... B1- B2
Attached
Opinion,
filed 10/3/02 ..... B3 - B11

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN:

Judgment of Sentence,
filed 10/4/01 ..... C1- C13

Verdict Form,
filed 3/30/01 ..... D1 - D5

Federal Statue:

18 U.S.C. § 922(g)(1) ..... E1 - E-1

Nos. 01-2310, 01-2361, 01-2375, 01-2410

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS LIDDELL,

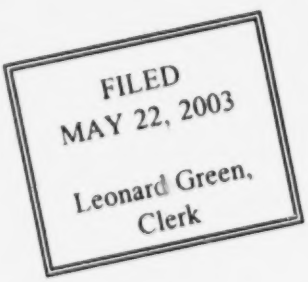
EDDIE ISOM,

CLARENCE ARIC THOMPSON,

RUBY LIDDELL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN



NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

BEFORE: RYAN, BATCHELDER and LAY *, Circuit Judges.

I.

PER CURIAM. This is a criminal appeal from a consolidated jury trial.[1] Douglas Liddell, Ruby Liddell (a.k.a. Rudy Liddell). Clarence Thompson, and Eddie Isom (collectively the "Defendants") were indicted on one count of conspiracy to distribute controlled substances and several other drug and gun violations. All four were found guilty of the conspiracy count with special verdicts indicating the drug and quantity ranges for each Defendant. In addition, three of the four Defendants were found guilty of one or more additional counts. The Defendants now appeal their convictions along with the district court's application of the United States Sentencing Guidelines. We affirm the district court in all respects.

---

* The Honorable Donald P. Lay, Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

[1] United States District Court for the Eastern District of Michigan, the Honorable Victoria A. Roberts, United States District Judge, and the Honorable David M. Lawson, United States District Judge, presiding.

II.

Rudy Liddell and Derrick Peterson began selling drugs in Saginaw, Michigan in 1990. Peterson moved to Detroit in 1993 and began buying larger quantities of cocaine to sell in Saginaw. Liddell made frequent trips to help deliver this cocaine. Eventually, the distribution business grew and diversified, involving multiple people in the sale of heroin, cocaine base, marijuana, and powder cocaine.

The conspiracy was eventually apprehended after investigators intercepted calls between a paid informant, Rudy Liddell, and Liddell's supplier. The investigators attempted a controlled sale of forty-seven kilograms of cocaine between the informant and Liddell. The sale fell through when the agents refused to give Liddell a sample of their cocaine. In the meantime, officers also made controlled purchases with Isom, Thompson, and multiple other co-defendants.[2]

Officers executed search warrants at six different residences in December 1998. Police seized drugs, scales,

---

[2] A total of twenty-two people were indicted for their involvement in the conspiracy. This jury was only asked to convict six of these Defendants. The others either pled guilty or were tried separately.

paraphernalia, and loaded firearms. Defendant Thompson also reportedly made several admissions to investigators during one of these searches. The Defendants were tried and convicted in March 2001. They now appeal with separate assertions of error.

III.

A. *Apprendi v. New Jersey*

Thompson and Douglas Liddell allege that their sentences violated their due process rights because the district court sentenced them using drug quantities which were not specifically found by their jury. *See Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).* In each Defendant's case, the jury issued a special verdict form which specified the quantities of drugs for which it found each Defendant responsible.

The *Apprendi* arguments made by these Defendants have no merit. Due process is only violated when a sentence is imposed which is beyond the allowed statutory maximum for the convicted crime. *Apprendi, 530 U.S. at 494-95.* The statutory maximum for each of these Defendants was twenty years imprisonment. *See 21 U.S.C. § 841(b)(1)(C).* Thompson received a sentence of sixteen years, three months, and Liddell received a sentence of ten

years, one month. As such, the district court did not violate the Defendants' due process rights.

B. Standard of Proof

Douglas Liddell argues that the district court erred in applying a preponderance of the evidence standard at sentencing. He urges that because the court's factual determinations exposed him to a sentence twice as long as the sentence "authorized" by the jury, the court should have applied a higher standard of proof.[3]

Under *McMillan v. Pennsylvania, 477 U.S. 79, 91-92, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)*, sentencing factors need to be established by a preponderance of the evidence. [*6] The adoption of federal sentencing guidelines does not change this approach. *United States v. Zajac, 62 F.3d 145, 148 (6th Cir. 1995)*. Liddell points to no mandatory legal authority for his argument.[4]

---

[3] The jury found Liddell responsible for less than 100 grams of heroin, which would have put him in a sentencing range of 63-78 months. At sentencing, the court found him responsible for 977 kilograms of marijuana equivalent, which placed him in a sentencing range of 121-151 months.

[4] Liddell argues, however, that *McMillan* also stands for the proposition that if a sentencing hearing is "a tail which wags

As such, *McMillan* is controlling and must be followed. *McMillan* requires that evidence used for sentencing be

---

the dog of the substantive offense," then its holding should not be seen to allow an increase in the entire range of penalties which the sentencing judge may utilize. *See McMillan, 477 U.S. at 88.* Liddell asserts that this holding should apply not just to cases that exceed the statutory maximum but also to those that shift the original guideline range to a higher range.

Liddell cites a Third Circuit case as an example of where a court required a higher standard of proof when a defendant's sentence was significantly higher than the sentence originally authorized by the jury. *See United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).* In *Kikumura,* the defendant was assessed an upward departure of 330 months based upon the sentencing factor of promotion of terrorism. The Third Circuit wrote "[where] the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as 'a tail which wags the dog of the substantive offense,'" a district court's factual findings regarding a sentencing enhancement must satisfy a higher standard of proof than mere preponderance of the evidence. *Kikumura, 918 F.2d at 1100-01* (quoting *McMillan, 477 U.S. at 88*).

found only by a preponderance of the evidence. This is the standard the district court used. Accordingly, we affirm.

C. Drug Quantity

Douglas Liddell's last assertion of error is that there was not enough evidence under the preponderance of the evidence standard to assess him with 977 kilograms of marijuana equivalent. He urges that the district court committed clear error in relying only on unreliable witness testimony to satisfy the burden of proof.

The district court may rely on any competent evidence in the record. Physical evidence is not required. *United States v. Pruitt, 156 F.3d 638, 647 (6th Cir. 1998).* Furthermore, we must defer to the district court's determinations unless there is no foundation for them. *United States v. Owusu, 199 F.3d 329, 339 (6th Cir. 2000)* (citing *Pruitt, 156 F.3d at 647*). The district court in this case specifically found the witnesses in question credible. The fact that such witnesses were uncorroborated drug users who testified pursuant to plea agreements does not automatically make their testimony not credible. There is no additional evidence before this court that the findings of the district court as to these witnesses' credibility were clearly erroneous. Accordingly, we affirm the district court's findings.

Douglas Liddell also alleges that he cannot be held responsible for an attempted transfer of heroin between Defendant Rudy Liddell and one Martin Buchanan. Again, this argument is no more than a challenge to the district court's credibility findings. As such, we review for clear error. *United States v. Hoskins, 173 F.3d 351, 354 (6th Cir. 1999)*. We find no clear error in the district court's finding. The district court found that this transaction was a part of the conspiracy at the time Douglas Liddell was involved and that the transaction was reasonably foreseeable.[5]

---

[5] To attribute this specific 100 grams of heroin to Liddell, the district court should have asked whether the transaction was (1) foreseeable to Douglas Liddell, and (2) within the scope or furtherance of the criminal activity he had agreed to undertake. At sentencing the district court found the 100 gram transaction was "foreseeable" but made no finding as to whether it was within the scope or furtherance of the criminal activity that was the subject of the conspiracy. However, assuming this was error, it was harmless error. This is so because the extra 100 grams of heroin attributed to Douglas from the Rudy Liddell/Martin Buchanan transaction raised the amount of marijuana equivalent attributed to Douglas from 777 kilograms to 877 kilograms. This did not alter the sentencing range to which Douglas was exposed because the

This is sufficient to attribute the transaction to Liddell under the conspiracy charge. We thus affirm the judgment of the district court.[6]

D. The Jury

1. Excusals for Cause

Defendant Eddie Isom alleges that two potential jurors should have been excused for cause. Under *United States v. Martinez-Salazar, 528 U.S. 304, 307, 145 L. Ed. 2d 792, 120 S. Ct. 774 (2000)*, no rule-based or constitutional right is violated if a defendant exercised a peremptory challenge against a potential juror he was unable to dismiss for cause, so long as no biased juror remained on the panel. The Defendants used their peremptory challenges to remove the

---

same range applies to any quantity between 700 kilograms of marijuana equivalent and 1,000 kilograms.

[6] At oral argument, counsel stressed that the district court had mistakenly attributed an additional 100 kilograms of marijuana equivalent to Douglas Liddell. This was a separate finding from the Buchanan transaction. Ultimately, as with the additional 100 kilograms from the Buchanan transaction, any error was harmless since the increase from 877 kilograms to 977 kilograms did not change the sentencing range to which Liddell was exposed.

potential jurors in question. As such, *Martinez-Salazar* is dispositive and this court does not need to further r eview the district court's ruling on dismissal for cause.

2. Batson Challenges

Defendants Eddie Isom and Rudy Liddell allege that the Government violated *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)* when it dismissed two potential jurors who were African-American.[7] The Defendants made a prima facie case under *Batson* (the Government does not deny this). However, the Government met its burden by offering race-neutral reasons for each potential juror's dismissal.[8] The Government is not required to articulate a reason which would be adequate enough for a challenge for cause. *Id. at 97.*

---

[7] There were no African-Americans on the jury and there were only three African-Americans total in the venire.

[8] One of the potential jurors was a recent divorce client of the one of the defense attorneys. The other confessed that she had two close friends who had been prosecuted and sentenced some years earlier. These previous cases had been prosecuted by the Assistant United States Attorney assigned to the case at bar.

The reason must simply be race-neutral. Accordingly, the findings of the district court on the Defendants' *Batson* challenges are affirmed.

E. Expert Testimony

At trial, the Government admitted into evidence an English translation of the transcripts of several Spanish language phone calls. Officer Jesse Diaz, an investigator on the case, testified as an expert as to the accuracy of the translations. Officer Diaz is a native Spanish speaker.

Defendants Eddie Isom and Rudy Liddell allege that it was an abuse of the district court's discretion to admit these transcripts. They argue that a jury could easily be confused by the dual role of both fact and expert witness presented by Officer Diaz. We have recognized that this situation involves significant risk but have not adopted a per se rule against allowing officers to testify as both a fact and expert witness. *See United States v. Tocco, 200 F.3d 401, 418 (6th Cir. 2000)*; *United States v. Thomas, 74 F.3d 676, 680-81 (6th Cir. 1996)*. We decline to do so today.

This court has found that there can be no abuse of discretion in this type of situation when the Defendants involved did not point to any specific inaccuracy in the translation or offer any alternative translation. *United States v. Garcia, 20 F.3d 670, 673 (6th Cir. 1994).*

The Defendants at bar never offered an alternate version of the transcripts or pointed out any inaccuracy in their translation. Accordingly, we find the district court did not abuse its discretion in admitting the translations or the expert testimony of Officer Diaz.

F. The Testimony of Derrick Peterson

Defendants Eddie Isom and Rudy Liddell contest the district court's decision not to declare a mistrial or strike the testimony of Government witness Derrick Peterson. The Defendants argue that the Government's acts in putting Peterson on the stand and not correcting his testimony constituted the presentation of known false evidence and required a mistrial under *Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972).*

The fact that a witness once perjured himself does not mean he will perjure again. Peterson was extensively impeached with his grand jury testimony and his prior statements to police. Although he did not outright admit his perjury at that time, he did admit to holding back during prior testimony.

Defense counsel was notified of the Government's knowledge of Peterson's false testimony prior to trial. The Government, therefore, met its obligations under *Brady. See Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).* There is no evidence that Peterson

perjured himself during his trial testimony. Furthermore, he was fully cross-examined and impeached. As such, we can find no evidence of an abuse of discretion by the district court. *See United States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990)* (noting that a district court's denial of a motion for mistrial is reviewed for abuse of discretion).

G. Thompson's Heroin Conviction

Defendant Thompson argues there was insufficient evidence to support a verdict that he had possessed heroin with an intent to distribute. Thompson admitted that he dealt "mostly" in cocaine and marijuana but had accompanied other conspirators on two occasions to pick up or deliver heroin. This statement constitutes an admission that part of Thompson's business was in heroin, or at the very least, that he was aware of the other conspirators' involvement in heroin. Such an admission is sufficient in this circumstance to support the jury's finding that Thompson's role in the conspiracy involved heroin. As such, Thompson's conviction is affirmed.

H. Thompson's Minor Role Adjustment

Thompson's last assertion of error is that the district court should have granted him an adjustment under the United States Sentencing Guidelines for a minor role in the conspiracy. We review a district court's findings of fact

under the Sentencing Guidelines for clear error and its conclusions of law *de novo. United States v. Rutana, 18 F.3d 363, 365 (6th Cir. 1994).*

A defendant is entitled to an adjustment for his minor role in the offense if he is less culpable than most of the other participants, but his role could not be described as minimal. U.S.S.G. § 3B1.2, cmt. n. 3. Thompson does not meet this standard. While his conduct may have been less culpable than the other Defendants, this does not say much about his overall culpability. Under our precedent, the defendant has the burden of proving that he was "*substantially* less culpable than the average participant." *Owusu, 199 F.3d at 337* (emphasis added) (citation omitted). The district court was not bound by the jury's findings on this matter. Notably, this jury did not make specific findings as to many other members of the conspiracy who were not before it. Further, while this jury did not find either Douglas Liddell or Eddie Isom responsible for any powder or crack cocaine, it found Thompson responsible for quantities of all four controlled substances. This distinction alone demonstrates that it is not obvious that Thompson was "substantially less culpable" than the other conspirators, and thus we cannot find clear error on the part of the district court in denying

him a minor role adjustment. As such, the sentencing of the district court is affirmed.

I. The Admission of Grand Jury Testimony

Finally, Rudy Liddell argues it was reversible error for the district court to admit the grand jury testimony of Fred Gilmer into evidence. The court admitted the testimony as a non-hearsay prior consistent statement under *Fed. R. Evid. 801(d)(1)*. This decision is reviewed for plain error. *United States v. Toney, 161 F.3d 404, 408 (6th Cir. 1998).*

Gilmer testified at trial that he obtained heroin by contacting Rudy Liddell and telling him he was "sick." Following these phone calls, a young man would arrive with heroin for sale. On the stand, Gilmer testified that he was unaware of the connection between Liddell and the heroin. In response, the Government presented Gilmer's conflicting grand jury testimony where he specifically stated he had bought heroin from Liddell on several occasions. According to the trial transcript, the court admitted this evidence as a prior *consistent* statement.

Liddell argues that this testimony is actually a prior *inconsistent* statement because it conflicts directly with Gilmer's in-court statements. As such, he asserts it should not have been admitted as a non-hearsay *consistent* statement. Since Gilmer was one of few witnesses who testified to Liddell's involvement with heroin, Liddell

asserts that his testimony was crucial on this point and it was more than harmless error for the court to admit this evidence.

We hold it was not plain error for the district court to admit the statement. The district court apparently recognized the testimony as a prior *inconsistent* statement and admitted the evidence despite an incomplete explanation for why such testimony was not hearsay. Additionally, in making an argument for admission of the testimony, the prosecutor specifically cited *Rule 801(d)(1)(A)*, which deals with *inconsistent* statements, and not (B), which deals with consistent statements.

The evidence was admissible as a prior inconsistent statement. As such, it was not hearsay. In this case, the semantics involved make any error by the district court harmless. Accordingly, we affirm.

IV.

We have reviewed all of the Defendants' assertions of error in detail. We find no error on the part of the district court. The judgment of the district court is thereby AFFIRMED.

Law Officer
SUZANNA KOSTOVSKI
Suite 200
1420 Washington Boulevard
Detroit, Michigan 48226-1716

(313) 965-6050
(313) 965-6051 Fax

Mr. Leonard Green
United States Court of Appeals - Sixth Circuit
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Re: USA v.Thompson
Case No. 01-2310; 01-2361; 01-2375

Dear Mr. Green:

The above-captioned matter is scheduled for oral argument on January 29, 2003. Recently, the Sixth Circuit decided the case of *USA v. Wegrzyn*, 2002 FED app. 0346P (6th Cir. 2002) (copy enclosed), where the Court affirmed the district court's finding that misdemeanant convicted of domestic violence in Michigan who were not sentenced to periods of incarceration should be able to possess firearms upon completion of their sentences of probation, since such misdemeanant sentenced to jail are able to possess firearms

after they are released, when their civil right to vote is restored. Otherwise, one convicted of a more egregious offense would be allowed to possess a firearm while one who committed a less serious offense would not. The Sixth Circuit further noted that the district court's conclusion is mandated by applicable law and gives effect to the intent of the Michigan legislature.

In this case, Mr. Thompson was convicted of 18 U.S.C. § 922(g)(1) as being a felon in possession. Mr. Thompson's prior "felony" was a misdemeanor crime of domestic violence, to which he was sentenced to probation and which he completed before the indictment in this case. Thus, although this issue was not raised in Appellant's Brief, Appellant respectfully requests the panel to consider the issue and overturn his conviction as to this court.

Very truly yours,

Suzanna Kostovski

yj

Enc.

cc: Patricia Gaedeke, Esq.
Clarence Aric Thompson

Nº 00-1712
United States Court of Appeals
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RONALD JOHN WEGRZYN,
Defendant-Appellee.

FILED
Oct. 3, 2002

Leonard Green,
Clerk

COUNSEL: ARGUED: Timothy P. VerHey, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellant.

Paul L. Nelson, FEDERAL PUBLIC DEFENDERS OFFICE, Grand Rapids, Michigan, for Appellee.

ON BRIEF: Timothy P. VerHey, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellant.

Paul L. Nelson, FEDERAL PUBLIC DEFENDERS OFFICE, Grand Rapids, Michigan, for Appellee.

JUDGES: Before: DAUGHTREY and MOORE, Circuit Judges; ECONOMUS, District Judge. *

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION:

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this appeal by the government, we are asked to resolve what appears to be a misfit between state and federal law involving the regulation of firearms in the possession of persons found guilty of domestic violence. Because we find the dilemma unresolvable in light of the relevant provisions in Michigan law and our cases interpreting them, we are compelled to affirm the judgment of the district court, which held that defendant Ronald Wegrzyn's conviction under 18 U.S.C. § 922(g)(9) cannot stand. *See United States v. Wegrzyn, 106 F. Supp. 2d 959 (W.D. Mich. 2000).*

The case comes to us in a somewhat unusual procedural posture. Following his arrest for possession of a firearm after previously being convicted for a misdemeanor crime of domestic violence, in violation of § 922(g)(9),

---

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

Wegrzyn agreed to a unique plea arrangement with the federal prosecutors. Because of the existence of "extenuating circumstances" in the case, the parties asked the court to take the defendant's plea of guilty to the weapons charge under advisement for a period of 18 months. Pursuant to the plea bargain, the district judge agreed that he would reject the plea after 18 months if the defendant had complied with all imposed conditions of his release. Furthermore, the government agreed to move at that point for dismissal of the charges against Wegrzyn. Unfortunately, the defendant failed to live up to his end of the bargain and, as a result, the government sought revocation of the grace period and timely sentencing on the underlying offense. Instead of granting the request of the assistant United States attorney, however, the district judge expressed his concern about the legal basis for the firearms conviction and eventually ruled that the federal conviction could not stand. Consequently, the court vacated the guilty plea and ordered Wegrzyn released from custody immediately.

In reaching his conclusion in this matter, the district judge recognized that the statutory provision in § 922(g)(9) that prohibits possession of a firearm by any person "who has been convicted in any court of a misdemeanor crime of domestic violence" is not absolute. Rather, the court noted, the prohibition is subject to certain limited exceptions listed in *18 U.S.C. § 921*(a)(33)(B)(ii), which provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned *or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)* unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id. (emphasis added).

Relevant to this appeal is the unusual impact of M.C.L.A. § 168.758b, which strips from *misdemeanants* their core civil right to vote only "while confined" in a correctional facility.[1] Thus, a person confined in Michigan for misdemeanor domestic violence, a crime punishable by incarceration for up to 93 days, see M.C.L.A. § 750.81(2), would have his or her civil rights restored immediately upon

---

[1] In relevant part, M.C.L.A. § 168.758b provides:

> A person who . . . has been legally convicted and sentenced for a crime for which the penalty imposed is confinement in jail or prison shall not vote, offer to vote, or be permitted to vote at an election while confined.

release, by operation of law, and would, therefore, be exempt from the prohibitions of 18 U.S.C. § 922(g)(9).

For the reasons articulated by this court in *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990), and *Hampton v. United States*, 191 F.3d 695 (6th Cir. 1999),[2] the district court further determined that misdemeanants convicted of domestic violence in Michigan who were not sentenced to periods of incarceration should also be able to possess firearms upon completion of their sentences of probation or other punishments. Otherwise, noted the district court, the untenable situation would occur in which an individual who presumably committed a more egregious offense justifying incarceration would nevertheless be allowed -- upon completion of the jail sentence -- to possess a firearm, while another misdemeanant whose transgression did not merit such severe punishment would be treated more harshly at the conclusion of a more lenient punishment.

On appeal, the government contends that the district court's analysis both ignores the plain language of the controlling statutes and compels an "absurd result" at odds with the clear intent of Congress and of the Michigan legislature. In fact, however, the district court's ruling in this

---

[2] Both *Cassidy* and *Hampton* involved interpretations of the analogous provisions of *18 U.S.C. § 921*(a)(20), dealing with the restoration of civil rights of *felons*, rather than misdemeanants.

matter actually gives effect to the exception crafted by Congress and to the peculiarities of Michigan criminal law. In enacting *18 U.S.C. § 921*(a)(33)(B)(ii), Congress chose to allow the states themselves to dictate the parameters of the statutory exception by recognizing the differences among state laws concerned with loss of civil rights upon conviction for certain offenses. Consequently, the Michigan legislature itself, by choosing to strip even misdemeanants of a core civil right, created the problem now facing the frustrated federal prosecutors. Indeed, had Michigan lawmakers, like almost all other state legislatures throughout the country, chosen to treat individuals guilty of lesser crimes (misdemeanors) less severely than felons and not stripped those individuals of their right to vote, the problem presented in this case by the later restoration of that right would never have arisen.

In short, it is the peculiar interplay between the relevant federal statutes, Michigan state legislation, and Sixth Circuit precedent that has resulted in a legal conclusion that here permits a statutory exception to swallow the intended rule. Although such a result may not be palatable to many, it is far from "absurd" because, besides being mandated by applicable law, it also gives effect to the Congressional intent to allow states to have input in the definition of the parameters of the crime, and gives effect to the expressed

intent of the Michigan legislature.[3]

---

[3] As explained by the district court in this matter:

> While Congress was aware that in most states persons convicted of misdemeanor offenses do not lose their civil rights, Congress allowed for the possibility that some states may actually strip misdemeanants of their civil rights. Hence, the parenthetical stating, "(if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." *18 U.S.C.* § 921(a)(33)(B)(ii). This construction is supported by the comments of Senator Lautenberg, the chief sponsor of the legislation:
>
> > Mr. President, another new provision in the final agreement clarifies that a conviction will not lead to a firearm disability if the conviction has been expunged or set aside, or is for an offense for which the person has been pardoned or has had civil rights restored. This language mirrors similar language in current law that applies to those convicted of felonies.
> >
> > I would note that the language on civil rights restoration, as it has been applied in the past, and as it should be interpreted in the future, refers only to major civil rights, such as the

Ironically, the Michigan populace is now forced to sacrifice some of its collective security only because of the state legislature's decision to impose -- in one aspect, at least -- the same penalty to *all* persons convicted of offenses against the state, regardless of the seriousness of the charge.

In an attempt to circumvent this result, the government also argues that loss of voting rights under M.C.L.A. § 168.758b is not a loss of civil rights as contemplated by *18 U.S.C. 921*(a)(33)(B)(ii). However, in *Hampton, 191 F.3d at*

> right to vote, to hold public office, and to serve on a jury. *Loss of these rights generally does not flow from a misdemeanor conviction, and so this language is probably irrelevant to most, if not all, of those offenders covered because of the new ban . . . .*
>
> 142 Cong. Rec. S11877-78 (1996) (statement of Sen. Lautenberg) (emphasis added). Thus Congress expressly contemplated the situation where a conviction for a misdemeanor crime of domestic violence may be outside the scope of § 922(g)(9) because the state's law provides for the loss and restoration of a misdemeanant's civil rights.

Wegrzyn, 106 F. Supp. 2d at 962-63.

699, we have already relied upon M.C.L.A. § 168.758b in noting that Michigan law provides for the loss and the later regaining of the right to vote for purposes of the federal felon-in-possession statute. We see no legitimate reason to abandon that view now in this instance.

Finally, the government contends that because *18 U.S.C. § 921*(a)(33)(B)(ii) refers to a criminal defendant's loss of civil rights, the loss of only a single one of the major civil rights of voting, serving on a jury, and holding public office is not sufficient to trigger application of that provision. Again, our decision in *Hampton* forecloses the result in this case. In *Hampton*, the loss of only a single civil right was considered sufficient to bar firearms use. It seems apparent that the same rule must apply here.

As a result, in light of Congress's deference to states' treatment of the disabilities associated with criminal convictions, and Michigan's own stripping of the right to vote from convicted misdemeanants, we are -- reluctantly -- forced to conclude that, upon successful completion of his probationary sentence, Ronald Wegrzyn is no longer considered ineligible to possess a firearm under the provisions of *18 U.S.C. § 922*(g)(9). The judgment of the district court in this matter is, therefore, **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

v.

CLARENCE ARIC THOMPSON,
Defendant.

CASE NO. CR 99-20018-BC-10
Hon. David M. Lawson

FILED
Oct 4, 2001

Clerk
US District Court
East. Dist. Mich
Bay City

JUDGMENT IN A CRIMINAL CASE
(For Offense Committed On or After November 1, 1987)

The defendant, **CLARENCE ARIC THOMPSON**, was represented by Suzanna Kostovski.

■ The defendant was found guilty on counts **1, 8, 17, 18, 26, 27** of the Second Superseding Indictment after a plea of not guilty.

COUNTS OF CONVICTION ARE LISTED ON PAGE [3]

The defendant is sentenced as provided in pages **[3]** through **[12]** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed: October 4, 2001 September 20, 2001
Date of Imposition of Judgment

Defendant's SSN: **366-98-0208**
Defendant's Date of Birth: **09-23-69**
Defendant's USM No.: **17011-039**
Defendant's Residence Address: **604 South 29th Street; Saginaw, MI 48601**

/S/ DAVID M. LAWSON
David M. Lawson
United States District Judge

COUNTS OF CONVICTION

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
21 USC 846	**Conspiracy to Possess With Intent to Distribute Controlled Substances**	**December 1998**	**1**
21 USC 841(a)(1)	**Distribution of Cocaine Base**	**October 15, 1998**	**8**
21 USC 841(a)(1)	**Possess with Intent to Distribute Cocaine Base**	**December 3, 1998**	**17**
21 USC 841(a)(1)	**Distribution of Marijuana**	**December 3, 1998**	**18**
18 USC 924(c)(1)(A)	**Carrying and Using a Firearm During a Drug Trafficking Crime**	**December 3, 1998**	**26**
18 USC 922(g)(9)	**Person Convicted of Domestic Violence in Possession of Firearm**	**December 3, 1998**	**27**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **195 months.** This custody term consists of 135 months on Counts 1, 8, and 17 concurrent: 60 months on Count 18, concurrent; and 120 months on Count 27, concurrent. Count 26 is for a term of 60 months, and is to run consecutive to all other counts.

■ The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a comprehensive drug abuse program, which is the Residential Drug Abuse Program. The Court also recommends that the defendant be designated to F.C.I. Milan if it is consistent with his security classification.

■ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this

Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4** years. This term consistes of 4 years on Count 1; 3 years on Counts 8, 17 and 27; 2 years on Count 18; and 4 years on Count 26, concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within *72 hours* of release form the custody of the Bureau of Prisons.

- The defendant shall not commit another federal, state or local crime.
- The defendant shall not illegally posses a controlled substance.

FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 13, 1994

*The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within **15 days** of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.*

- The defendant shall not own or possess a firearm, destructive device, or dangerous weapon as defined in 18 U.S.C. § 921.

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with any additional conditions as listed on the attached page entitled special conditions of supervision.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the Probation Department access to any requested financial information.

2. The defendant is prohibited from incurring any new credit charges or opening new lines of credit, individually or jointly, without the approval of the probation officer, unless he is in compliance with the payment schedule.

3. The defendant shall participate in a program approved by the Probation Department for substance abuse, which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol.

4. The defendant shall pay any fine, or special assessment fee imposed by this Judgment that remains unpaid as directed by the Court, at a rate and schedule to be determined by the Probation Department and approved by the Court.

5. The defendant shall establish a plan with the Saginaw County Friend of the Court to satisfy the child support arrearage with that agency and abide by that plan.

6. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervision and at least two periodic drug tests thereafter for use of a controlled substance, as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 600.00**	**$20,000.00**	**$0.00**
If applicable, restitution amount ordered pursuant to plea agreement			**$0.00**

FINE

The above fine includes the costs of incarceration and/or supervision.

The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

- **THE INTEREST REQUIREMENT IS WAIVED.**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties

PAYMENT OF TOTAL FINE AND OTHER CRIMINAL MONETARY PENALTIES SHALL BE DUE AS FOLLOWS:

- IN FULL IMMEDIATELY.

I hereby certify that the
foregoing is a true copy of the
original on file in this office.
By /S/ Tracy Jacobs
Deputy Clerk

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS
(Not for Public Disclosure)

■ The Court adopts the factual findings of the presentence report except for: the Court finds an appropriate adjustment downward of two levels for a base offense level of 32.

Guideline Range Determined by the Court:

Total Offense Level:	**32**
Criminal History Category:	**II**
Imprisonment Range:	**135** months to **168** months
Supervised Release Range:	**2** to **5** years
Fine Range:	**$ 20,000.00** to **$ 4,000,000.00**
Total Amount of Restitution:	**% N/A**

■ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: the defendant was deeply involved in an expansive drug trafficking conspiracy. In addition, the law requires at least 60 months consecutive because of his possession of a firearm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES
OF AMERICA,
Plaintiff,

No. 99-CR-20018-10
Hon. David M. Lawson

v.

CLARENCE ARIC THOMPSON,
Defendant.

FILED
Mar 30, 2001

Clerk
US District Court
East. Dist. Mich
Bay City

Verdict Form

As to Count 1 of the indictment, we the jury, by unanimous verdict, find the defendant, Clarence Aric Thompson:

____ Not Guilty.

__X__ Guilty of conspiracy to commit the crime of possession with intent to distribute or to distribute the following:

____ various quantities of cocaine totaling 5 kilograms or more.

____ various quantities of cocaine base (crack cocaine) totaling 50 grams or more.

____ various quantities of marijuana totaling 1,000 kilograms or more.

or

____ various quantities of heroin totaling 100 grams or more

__X__ various quantities of cocaine totaling 500 grams but less than 5 kilograms

____ various quantities of cocaine base (crack cocaine) totaling 5 grams but less than 50 grams

____ various quantities of marijuana totaling 100 kilograms but less than 1,000 kilograms.

or

__X__ various quantities of heroin totaling less than 100 grams,

____ various quantities of cocaine totaling less than 500 grams

__X__ various quantities of cocaine base (crack cocaine) totaling less than 5 grams

____ various quantities of marijuana totaling 50 kilograms but less than 100 kilograms.

or

__X__ various quantities of marijuana totaling less than 50 kilograms.

(You may select more than one kind of controlled substance for which the defendant is accountable, but you may not select more than one quantity range for each controlled substance. Your verdict as to the kind and amount of a controlled substance must be unanimous.)

Judge's Copy

As to Count 8 of the indictment, we, the jury, by unanimous verdict, find the defendant, Clarence Aric Thompson:

____ Not guilty.

__X__ Guilty of distributing cocaine base (crack cocaine) on or about October 15, 1998.

As to Count 17, of the indictment, we, the jury, find the defendant, Clarence Aric Thompson:

____ Not guilty.

__X__ Guilty of possession of cocaine base (crack cocaine) with intent to distribute it on or about December 3, 1998.

____ Guilty of possession of cocaine base (crack cocaine) on or about December 3, 1998.

As to Count 18 of the indictment, we, the jury, by unanimous verdict, find the defendant, Clarence Aric Thompson:

____ Not guilty.

__X__ Guilty of possession of marijuana with intent to distribute it on or about December 3, 1998.

____ Guilty of possession of marijuana on or about December 3, 1998.

As to Count 26 of the indictment, we, the jury, by unanimous verdict, find the defendant, Clarence Aric Thompson:

____ Not guilty.

__X__ Guilty of possession of a firearm in furtherance of a drug trafficking offense, on or about December 3, 1998, in violation of federal law.

As to Count 27 of the indictment, we, the jury, by unanimous verdict, find the defendant, Clarence Aric Thompson:

____ Not guilty.

X Guilty of possession of a firearm after previously having been convicted of a domestic violence offense, on or about December 3, 1998, in violation of federal law.

/S/ ROGER WILTSE
Foreperson

Date: 3-30, 2001

18 U.S.C. § 922(g)(1):

It shall be unlawful for any person -

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.